

CASE COMMENTARY

**ANONYMITY AND ADOPTION - A CLASH OF RIGHTS**

**Re C (A Child) (Adoption: Duty of Local Authority)**

[2007] 2 FCR 650

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The Ospedale degli Innocenti in the Piazza della Santissima Annunziata in Florence, which dates back to the 15<sup>th</sup> century, was a place of refuge for babies whose mothers could not cope with taking care of them. Brunelleschi, the Italian architect and engineer, was responsible for the design of the beautiful colonnaded building. Its façade is adorned with blue and white glazed terra cotta bas-reliefs, sculpted by Andrea Della Robbia. These depict chubby Florentine babies, naked or wrapped in swaddling clothes, and are a symbol of the building's function. Any mother who wished to surrender her baby into the care of the Ospedale could place it in a stoup below a small window in a wall of the building. The stoup opened onto an inner room where a woman waited and removed each baby immediately after it was placed there. In the 18<sup>th</sup> century the stoup was replaced by a wheel, rather like a "lazy Susan". The baby was placed on the wheel, which was turned, and the baby was delivered into the arms of the woman waiting inside the orphanage. Babies were sent out to wet nurses until they were weaned and then returned to the orphanage where they remained until they were fostered out or became old enough to work or, in the case of girls, betrothed to marry. All the children acquired the same family name - Innocenti.

The most important fact about the refuge was that the mother was allowed to remain completely anonymous; no effort was made to find out her identity. The mother was able to depart knowing that her baby was in safe hands and that no one need know that she had given birth. But of course in 15<sup>th</sup> century Florence there was no law which permitted a challenge to her right to anonymity and allowed the authorities to hand over the baby into the care of a member of her extended family against the mothers' will.

Life in 21<sup>st</sup> century England for an unmarried mother, who wishes to surrender her child for adoption, is remarkably different from that of 15<sup>th</sup>

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century Florence. There is both domestic law in the form of the Adoption and Children Act 2002 (“Adoption Act”), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR) which may lead to an interference with a mother’s desire for anonymity. She risks the intervention of the local authority, and its social workers, to whom she has entrusted her child to be placed for adoption. In the interests of the child’s welfare, under s1 of the Adoption Act, and right to family life under Art 8 of the Convention, they may attempt to destroy the mother’s right to private life, under Art 8 of the Convention, and ensure that her family and the child’s father and his family, who may also have rights to family life under Art 8, are made aware of the situation and be asked to care for the child.

The decision of the Court of Appeal in *Re C (a child) (adoption: duty of local authority)*<sup>59</sup> addressed these issues both in terms of the Adoption Act and the Convention.

### THE FACTS IN *RE C*

The appellant mother, in *Re C*, was nineteen years old and unmarried. She had become pregnant as a result of a one off sexual encounter with the child’s father and had given birth to a baby daughter who was four months old at the time of the Appeal Court hearing. The mother was unaware of her pregnancy for a considerable period of time. She had not confided in the father, or her family, about her pregnancy or the baby’s birth. Indeed, she had only sought medical help when she went into labour. Immediately after the birth, the mother made a request to the local authority to place her baby daughter for adoption and left hospital without her. The mother made clear to the local authority, within whose jurisdiction the case fell, that she was not prepared to identify the baby’s father, and that she did not think anyone in her extended family could care for the baby. She explained to the social worker that her parents were divorced. She had left home at the age of seventeen after a serious dispute with her mother, and no longer was in contact with her.. Her father was retired, and she rarely saw him. He had remarried; his new wife had three teenage children of her own. The local authority’s response to this information was to make an application for a care order under the Children Act 1989.

### THE JUDGE’S DECISION

The judge acknowledged that the application should have been made under the Adoption Act and that s 1(2) of the Act, like s 1 of the Children Act 1989, provides that in reaching any decision relating to the adoption of a child

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<sup>59</sup> [2007] 3 FCR 659, EWCA Civ 1206.

“The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life...”

The judge held that s 1 of the Adoption Act left the local authority with no choice but to inform themselves about the background of the mother's family in order to decide the baby's future. He maintained that it would be in the best interests of the baby:

“...to be placed within the family... the reality is -- as we all know nowadays -- that when children are adopted they come to a time in their lives when they do enquire about their parentage and it would be cruel in the extreme to prevent this child having as much knowledge as possible about her background in the event that she is adopted, even if that information comes without the consent of the mother but as a result of the authorities informing themselves of the relevant information.”<sup>60</sup>

The judge expressed the hope that the mother would change her mind and agree to help the local authority to work with her family. He made an order which gave the mother twenty-one days to consider whether she might cooperate, but if she failed to do so, the local authority would be free to contact her family. There was a misunderstanding about the nature of the order, and the children's social care section of the local authority contacted the mother's parents by letter. It asked to meet with them but failed to explain the purpose of such a meeting. The parents subsequently learned of the baby's birth and offered to help the local authority resolve the situation.

The mother appealed the order.

### **THE JUDGMENT OF THE APPEAL COURT (ARDEN, COLLINS, THORPE LJ)**

There were two issues arising on the appeal. First, whether s 1 of the Adoption Act imposed an absolute duty on the local authority, prior to the baby's adoption, to contact any of her biological relatives to ascertain whether she could be cared for by them. Second, how the court's discretion to give directions about contacting relatives should be exercised.

Arden LJ gave the leading judgment, with which Collins and Thorpe LJ concurred, and the mother's appeal was allowed.

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<sup>60</sup> Ibid, at para 11.

*Judicial Discretion Prior to the Adoption Act*

Prior to the Adoption Act 2002, Arden LJ explained, the courts had discretion to decide whether to take into account the views of an unmarried father, who had not acquired parental responsibility, of a newborn baby before she was placed for adoption. In general, there was a judicial assumption that the father should be informed of his child's birth unless there were very good reasons not to do so. Art 8 of the Convention confirmed that approach (see *Rozanski v Poland*).<sup>61</sup> However, Art 8 presupposes the existence of a family (see *Marckx v Belgium*,<sup>62</sup> *Johnson v United Kingdom*).<sup>63</sup> Thus, a father will sacrifice his right if his relationship with the mother was fleeting and/or there was little semblance of a family to which he belonged (see *Nylund v Finland*).<sup>64</sup> Similarly, he will not be contacted if the relationship with the mother was abusive. The decisions in *Re H*, *Re G (Adoption: Consultation of Unmarried Fathers)*<sup>65</sup> illustrates the courts' approach to the rights of fathers under Art 8. In *Re G*, the mother had never lived with the father of her child. Their relationship had not been sufficiently committed for the court to find that they were a family prior to the child's birth. Consequently, the father had no right to be informed of the adoption proceedings. By contrast, in *Re H*, the mother had cohabited for a time with the father of the child and had previously given birth to another child by him, and to whom the father showed a continuing commitment. The father was held to have a right to family life and should therefore be consulted about the adoption (see also *JRM v Netherlands*).<sup>66</sup> Contact with the father, of course, presupposes that his identity is known. If the mother refuses to identify him, there is little that a court can do to enforce contact. In *re L* (2007),<sup>67</sup> Munby J stated that apart from repeating the request to the mother to identify the father no further steps could be taken.

*The Statutory Framework of the Adoption Act*

Arden LJ maintained that the judicial discretion relating to the involvement of unmarried fathers, without parental responsibility, in the adoption proceedings had been changed by s1 of the Adoption Act. That section now provides a statutory framework, albeit with a discretionary element, for the determination of any decisions relating to the adoption of a

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<sup>61</sup> (2005) App 55339/00.

<sup>62</sup> (1979) 2 EHRR 330.

<sup>63</sup> (1999) 27 EHRR 296.

<sup>64</sup> Application No 27110/95.

<sup>65</sup> (2001) 1 FLR 646.

<sup>66</sup> Application No 16944/90.

<sup>67</sup> EWHC 1771.

child including questions of contact with the child's family of origin, prior to placement for adoption. The overarching paramountcy principle which is laid down in s 1(2) of the Act is child centred rather than mother centred. Adoption is seen more as a means of 'giving a child a family and not the child to a family' (see *Frette v France*).<sup>68</sup> S 1(3) specifically emphasizes the fact that delays in decision making are not generally beneficial for the welfare of children, and the courts and the local authority must bear that in mind. S 1(4) provides a non-exclusive, non-hierarchical check list of the matters to which the local authority and the court must have regard in making a decision relating to the future adoption of the child. They are:

- any likely effect on the child of ceasing to be a member of his or her original family (s1(4)(c));
- the relationship which the child has with relatives or any other person who is viewed as relevant (s1(4)(f));
- the likelihood of that relationship continuing and the value of it to the child (s1(4)(f)(i);
- the ability and willingness of any relative or other person to provide the child with a secure environment in which the child's needs and development can be nurtured (s1(4)(f)(ii);
- the wishes and feelings of the child's relatives or of any other such person regarding the child (s1(4)(f)(iii).

### *The Duty to Consult and the Welfare Principle*

The meaning of relatives in s 1(4)(f) of the Act, is not limited to legal relations (s 1(8)) nor, according to Arden LJ, was it limited to those with whom the child has had a relationship but might also include, in accordance with Art 8 of the Convention, potential relationships which the child might develop in the future (see *Pini v Romania*).<sup>69</sup> However, she circumscribed the effect of the section and explained that the combination of s 1(2) and s 1(4)(f) means that:

"... when a decision requires to be made about the long-term care of a child, whom a mother wishes to be adopted, there is no duty to make enquiries [of the family] which it is not in the interests of the child to make, and enquiries are not in the interests of the child simply because they will provide more information about the child's background: they must genuinely further the prospect of finding a long-term carer for the child without delay. This interpretation does not violate the right to

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<sup>68</sup> (2004) 38 EHRR 21.

<sup>69</sup> (2005) EHRR 1.

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family life. The objective of finding long-term care must be the focus of making any further enquiries and that means the court has to evaluate evidence about those prospects. That did not happen in this case.”<sup>70</sup>

Arden LJ found that the judge in the court below had merely considered:

“...that in adult life the child would benefit from more information about the child’s father. But in the context of the decision-making with which the judge was concerned, I do not consider that that fact could of itself animate indeed the exercise of discretion. The immediate question with which the Guardian and local authority were concerned was who would look after the child on a long-term basis. The enquiries had to be focused on that result. That meant looking at the evidence about the prospective carers within the mother’s family... finding out about the child’s background for her information in the future was secondary to that objective, and it would inevitably lead to delay.”<sup>71</sup>

The father, in *Re C*, in accordance with the authorities above, had forfeited his right to any relationship with her.

Arden LJ accepted that the mother’s clear, and negative, views about the suitability of anyone within her daughter’s family of origin as a potential carer, was not a conclusive reason not to permit contact with the family, but it should certainly have been taken into consideration.

Throughout her judgment, Arden LJ stressed that in any decision relating to the question of contacting a new born baby’s extended family, the welfare principle demanded that a permanent home be found for her, without delay, with parents who could commit to care for her throughout her life and with whom she could form a lasting relationship. The bond with her foster parents had already begun to develop and it would be very hard for her to cope with the move to new adoptive parents if a decision about her future was not made with the utmost urgency.

In granting the mother’s appeal, the Court of Appeal made an order to the effect that the local authority:

- must not identify the father or inform him of the birth of the baby;
- must not introduce the baby to her grandparents or assess them as potential carers for her;

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<sup>70</sup> Ibid, nb 1, para 3.

<sup>71</sup> Ibid, nb 1, para 21.

- must meet with the maternal grandparents to discuss the letter which it had sent to them and explain to them the outcome of the appeal.

*The Benefits of Anonymity*

Thorpe LJ, with a certain amount of empathy, drew attention to the dilemma faced by mothers who wish for anonymity vis-a-vis the father of their child and/or their extended families when relinquishing a baby for adoption. He accepted that there were valid social policy considerations for permitting the mother to treat the experience of pregnancy and birth as a matter for her alone and not one to be shared with the baby's extended family (see eg *Odièvre v France*).<sup>72</sup> Thorpe LJ pointed out that in France it had been long acknowledged that anonymity for mothers reduced the risk of abortion, infanticide or abandonment, as well as possible damage to the mother or her child as a result of giving birth secretly.

A further risk was referred to by Thorpe LJ; if the Court of Appeal was to refuse the mother's appeal and hold that the local authority was under an absolute duty to contact the child's extended family, it could affect fast track adoption. Fast track adoption under s19 of the Adoption Act, together with the emphasis in s 1(3) of the Act on the prejudicial effect of delay on the child in placing her with an adoptive family, was considered to be a corner stone of the legislation by Parliament. Babies need stable families and they need them as rapidly as possible after birth if they are to bond with their adoptive parents, and grow up into psychologically well-adjusted adults.

*The Adoptive Child's Rights to Knowledge of her Birth Family*

Under English law, an adoptive child has minimal rights to knowledge of her family of origin. At the age of eighteen, she may consult the Adopted Children Register and acquire a copy of her birth certificate. Armed with this information, she may then consult the Adopted Contact Register, which lists birth parents and relatives of adopted children who wish to be contacted by an adopted person. The latter may also list her own details on the register.

The judge in *Re C*, appeared to be taking it into his own hands to attempt to ensure that more information about the child's family of origin would be available to her at a later date even if none of its members were able to care for her. It may be that the child's own Art 8 rights could be called into play to support such an approach. It would however conflict with the mother's right to a private life.

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<sup>72</sup> (2003) 1 FCR 621.

### *Fathers' Rights*

Many fathers of adopted children maintain that their Art 8 rights to family life are far too strictly limited by the need to demonstrate the existence of a family and some level of permanency in their relationships with a child's mother, prior to the child's birth. They may well be prepared and able to take care of a child but will not be given the opportunity to do so even if the mother is prepared to reveal the father's identity. It may be that a mother's right to anonymity requires to be balanced more equally with the father's right to contact with his child (See Families Need Fathers [www.fnf.org.uk/](http://www.fnf.org.uk/)).

### **BABY SAFE HAVENS**

Thorpe LJ, in *Re C*, pointed out that there is not only one solution to the tension between the rights of the mother and the rights of the child. In the US, a very different solution has been found to help mothers who feel unable to care for their new born children and who do not wish their families to be involved. Forty-six States have now enacted legislation permitting the anonymous, but responsible, handing over of unwanted babies. Massachusetts is one of them. The 21<sup>st</sup> century fire-houses, hospital emergency rooms and police stations of Massachusetts are a far cry, particularly architecturally, from the Ospedale degli Innocenti, yet they too have been charged with the reception of abandoned babies under the Massachusetts Baby Safe Haven Law which was enacted with a three year sunset clause in October 2004. In August 2007, the Governor of Massachusetts, Deval Patrick, made the legislation permanent. The Law was a sympathetic, emotional response to the predicament of an abandoned baby, known as Baby Vinnie, who was found wrapped in a blanket in a churchyard on Martha's Vineyard by a woman out walking. The baby was suffering from hypothermia; he had been lying in the direct line of a sprinkler system throughout the night and was thoroughly soaked through. He survived after hospital treatment and was adopted.

The Massachusetts Law legalizes the abandonment of babies up to seven days old, as long as they have not been abused, and have been handed over to an official at any of the designated locations. The mother's total anonymity is permitted, although those handing over babies are encouraged, but may not be coerced, to give any information which might help to ensure the satisfactory future care of the child. Any child surrendered in this manner is immediately placed in the custody of the Department of Social Services and, after a medical screening, is placed for adoption. The Law also provides for a Baby Safe Haven Hotline which operates twenty-four hours a day and gives information to pregnant mothers about pregnancy help and the post-birth options open to them.



The Law is not without its vociferous critics. The liberal pro-choice lobby maintains that it is a creation of the American anti-abortion lobby and merely an indirect means of strengthening its position. After all, if a parent can legitimately abandon a baby at birth, the case against abortion becomes even stronger. Others argue that it is unfair to the baby who, if the mother decides not to hand over any personal information, will lack knowledge of its biological parents and genetic background which might be essential for medical reasons at some future date. The Law also appears to conflict with the growing demands of those involved in child welfare that all children, whether adopted, or conceived by way of reproductive technology involving donor eggs or sperm, have a right to information about their biological origin. Psychologists have voiced concern that the seven-day time limit places enormous and unfair pressure on a mother, who has just given birth, to make a momentous decision about the future of her child when she is in an emotionally fragile condition. Unmarried fathers fear that mothers may use the Law to prevent any possibility of their involvement with their biological children. The more serious sceptics believe that the type of parent for whom the legislation was enacted is unlikely to be sufficiently organized or confident enough to take her baby to a designated place of safety. It is all too easy to be dismissive of the benefits of the legislation; few babies have been surrendered to the authorities in Massachusetts since late 2004 compared with the vast numbers received at the Ospedale degli Innocenti over a similar period of time. However, it is possible that the publicity surrounding the legislation has drawn attention to the problems experienced by those who find themselves unhappily pregnant. It may help mothers, who might have been tempted to abandon their babies, to find an alternative route. The legislation may be imperfect but it may help to safeguard the welfare of unwanted babies and is certainly preferable to abandonment.